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IN THE COURT OF APPEALS OF INDIANA

EMIGDIO LOPEZ,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 05A05-0701-CR-6
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE BLACKFORD CIRCUIT COURT
The Honorable Bruce C. Bade, Judge
Cause No.05C01-0404-MR-11

September 29, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issues

Following a jury trial, Emigdio Lopez appeals his conviction of murder, a felony, and his sixty-five-year sentence. Lopez raises five issues, which we restate as:

1) whether the trial court abused its discretion in admitting into evidence Lopez's statements made to police officers;

2) whether the trial court abused its discretion in excluding evidence relating to the victim's prior violent conduct;

3) whether the trial court improperly failed to order a mistrial based on a witness's violation of the witness separation order;

4) whether Lopez received ineffective assistance of counsel based on his trial counsel's failure to move for a mistrial after learning that a witness had violated the witness separation order;[1] and

5) whether the trial abused its discretion in sentencing Lopez by failing to find certain mitigating circumstances.

Concluding that the trial court did not abuse its discretion in admitting or excluding evidence; that a mistrial was not warranted and therefore the trial court did not abuse its discretion in failing to order one and Lopez's counsel was not ineffective for failing to move for one; and that the trial court did not abuse its discretion in sentencing Lopez, we affirm.

[1] Although issues three and four are distinct, we address them together below, as our conclusion that a mistrial was not warranted resolves both issues.

Facts and Procedural History

Melvin Hernandez, Sr., and Brandi Hernandez married in 2001 and had a son. In 2003, Melvin was convicted of two charges of intimidation with a deadly weapon against Brandi. He was incarcerated, and eventually deported to Mexico. After Melvin was incarcerated, Brandi began dating Lopez, who eventually moved in with Brandi. Sometime in early 2004, Melvin called Brandi and told her that he was returning to Indiana to live with her and their son. Brandi told Lopez that he would have to move out of their apartment, and he complied. Melvin moved in with Brandi and their son on March 31, 2004. On April 14, 2004, Melvin returned home from work around 3:00 a.m. Brandi left for work around 4:30 a.m. Shortly after 5:00 a.m., a neighbor heard a loud noise, a male voice yelling, and a baby crying. Brandi returned home from work shortly after 3:40 p.m. and found Melvin lying dead in the living room in a pool of blood. Her son was also in the apartment, walking around covered in blood. It was later determined that Melvin had been stabbed over seventy times and had suffered blunt force trauma to his head. Brandi called Lopez to tell him of Melvin's death, and according to Brandi, "he told me that he knew. He told me that bad things like this was going to happen." Transcript at 569.

On April 14, 2004, Detective Darrell Thornburgh, of the Indiana State Police Department, interviewed Brandi and learned of her relationship with Lopez. He then instructed two officers to go to Lopez's apartment to bring him in for an interview. Lopez and his roommate agreed to go with the officers. Because Lopez speaks limited English, Detective Thornburgh had America Valdez, a dispatcher, who provides

translation services for the Marion Police Department, come in and translate. During this interview, Detective Thornburgh asked Lopez about a bandage he was wearing on his hand. Lopez stated that he cut his hand at his place of employment when a glass jar fell out of a box and cut him. After the interview, officers drove Lopez back to his apartment.

On April 16, 2004, Detective Thornburgh went to Lopez's place of employment, where one of Lopez's co-workers told Detective Thornburgh that Lopez had come to work the morning of April 14 wearing a glove on one hand. Detective Thornburgh then went to Lopez's apartment and asked him to accompany him to the police station for another interview. When they arrived at the police station, Valdez gave Lopez a Miranda warning in Spanish. Lopez indicated that he understood and wanted to answer Detective Thornburgh's questions. Detective Thornburgh told Lopez that he did not believe Lopez cut his hand at work. Lopez eventually changed his story and said that he cut it while trying to unlock his car door with a knife. At some point, Detective Thornburgh decided that instead of questioning Lopez through an interpreter, he would prefer to have a Spanish-speaking officer conduct an interview. Detective Thornburgh scheduled an interview between Lopez and Sergeant Sam Muldanado for April 21, 2004.

On April 21, Detective Thornburgh picked up Lopez and drove him to the interview. Sergeant Muldanado conversed with Lopez for several minutes to make sure that there was no communication problem. Sergeant Muldanado then read Lopez his Miranda rights, and Lopez indicated that he wanted to answer questions.

During the course of questioning, Lopez initially denied being at Melvin and Brandi's apartment the morning of the murder. He later claimed that he had been abducted by six men, who took him to the apartment and murdered Melvin. He claimed the men cut his hand as a warning to not speak to the police about the murder. Sergeant Muldanado told Lopez that this story was not believable based on the footprints observed at the murder scene. Lopez then stated that he had driven to the apartment to speak with Brandi and her son. He said that when he arrived, Melvin invited him inside. He said that Melvin became angry when Lopez said he was there to see Melvin and Brandi's son, and that Melvin grabbed a knife from the kitchen. He said that a struggle ensued, and that Melvin must have fallen on the knife. Lopez later admitted to cutting Melvin five or six times, and to having hit Melvin in the head with a fireplace poker. Lopez then agreed to show police where he had disposed of certain evidence. However, none of these items were in the places Lopez indicated.

On April 22, 2004, the State charged Lopez with murder. Prior to trial, Lopez filed a motion to suppress statements made to police during the three interviews. The trial court held a hearing and denied Lopez's motion to suppress. Also prior to trial, the State filed a motion in limine to exclude information regarding Melvin's prior acts. The trial court granted this motion in limine.

On February 16 through March 2, 2006, the trial court held a jury trial. At trial, the State introduced the evidence of Lopez's statements to the police. The State also introduced DNA evidence indicating that Lopez's DNA was present in blood stains located in the apartment's living room fireplace and floor, the doorway between the

kitchen and living room, a pillow case in the master bedroom, and from the floor in front of a small table in the master bedroom. The State also introduced evidence that indicated the initial attack on Melvin occurred while Melvin was lying in bed. Lopez took the stand in his own defense and denied committing the murder or being at the apartment that morning. He claimed he had lied to the police about going to the apartment "because [he] had tried to tell [Sergeant Muldanado] the truth, and he wouldn't believe any of it." Tr. at 1394.

The jury found Lopez guilty of murder. The jury then found the following aggravating factors: (1) Lopez committed a forcible felony in the presence of a child; (2) Lopez placed a child in a situation that endangered the child's life or health; (3) the victim was in a vulnerable or weakened condition, as he was asleep when the initial attack occurred; and (4) the victim suffered severe pain as a result of the attack. On October 5, 2006, the trial court issued a sentencing order in which it noted these aggravating circumstances and found as a mitigating circumstance that Lopez did not have a serious criminal history. The trial court found the aggravating circumstances "greatly outweigh the mitigating circumstance," and sentenced Lopez to sixty-five years. Appellant's Appendix at 222. Lopez now appeals his conviction and sentence.

Discussion and Decision

I. Admission and Exclusion of Evidence

A. Standard of Review

We review a trial court's decisions regarding the admission or exclusion of evidence for an abuse of discretion. Collins v. State, 826 N.E.2d 671, 677 (Ind. Ct. App.

2005), trans. denied, cert. denied, 546 U.S. 1108 (2006). We will find that a trial court has abused its discretion when its decision is "clearly against the logic and effect of the facts and circumstances before it." Id. Even when we find that a trial court has abused its discretion by admitting or excluding evidence, we will not reverse unless the defendant's substantial rights have been affected. Ind. Evidence Rule 103(a); Pruitt v. State, 834 N.E.2d 90, 117 (Ind. 2005), cert. denied, 548 U.S. 910 (2006). In determining whether or not a party's substantial rights were affected, we "assess the probable impact of that evidence upon the jury." Corbett v. State, 764 N.E.2d 622, 628 (Ind. 2002).

B. Lopez's Statements to the Police

A person must be informed of the right to remain silent and to an attorney, and that what he says may be used against him any time "law enforcement officers question a person who has been 'taken into custody or otherwise deprived of his freedom of action in any significant way.'" Luna v. State, 788 N.E.2d 832, 833 (Ind. 2003) (quoting Miranda v. Arizona, 384 U.S. 436, 444 (1966)). Statements given in violation of Miranda are normally inadmissible in a criminal trial. Morris v. State, 871 N.E.2d 1011, 1016 (Ind. Ct. App. 2007), trans. denied.

Lopez argues the trial court abused its discretion in admitting evidence of statements made by him at the three interviews with police officers. Lopez argues that he was in custody during all three interviews, and that the Miranda warnings given at the second two interviews were inadequate, as he was unable to understand the officers' warnings. We conclude that Lopez was not in custody during the first interview, and therefore no Miranda warning was required. With regard to the second two interviews,

we conclude that even if Lopez was in custody, the record indicates the Miranda warnings given were sufficient and understood by Lopez.

1. The April 14 Interview

"Miranda warnings do not need to be given when the person questioned has not been placed in custody." Johansen v. State, 499 N.E.2d 1128, 1130 (Ind. 1986). A person is in custody "if a reasonable person under the same circumstances would have believed that he was under arrest or not free to resist the entreaties of the police." Clark v. State, 808 N.E.2d 1183, 1193 (Ind. 2004); see also King v. State, 844 N.E.2d 92, 96-97 (Ind. Ct. App. 2005) ("The test is how a reasonable person in the suspect's shoes would understand the situation."). We will examine all the circumstances surrounding an interrogation, and are concerned with "objective circumstances, not . . . the subjective views of the interrogating officers or the subject being questioned." Gauvin v. State, 878 N.E.2d 515, 520 (Ind. Ct. App. 2007). In order to conclude that the defendant was indeed in custody at the time of the statement, we must find that the officer "by means of physical force or show of authority, has in some way restrained the liberty of a citizen." Jones v. State, 866 N.E.2d 339, 342-43 (Ind. Ct. App. 2007), trans. denied.

After speaking with Brandi, Officer Thornburgh directed two officers to go to Lopez's apartment and bring him in for an interview. The officers brought Lopez's roommate along as well. Officer Thornburgh described this initial interview as "an informational-type interview to verify the information that we'd received from Brandi." Tr. at 638. He also testified that he understood that Lopez came to the station voluntarily. Lopez testified that the police did not "use force to have him come to [the police

station]," tr. at 490, and that the officers' requests were "free of threats," id. at 491. That Lopez voluntarily came to the police station weighs in favor of him not being in custody. See Southern v. State, 878 N.E.2d 315, 320 (Ind. Ct. App. 2007) (concluding the defendant was not in custody and noting that the defendant voluntarily attended the meeting at which questioning occurred), trans. denied.

Although the fact that the interview took place at the police station is a factor in favor of concluding Lopez was in custody, see id., this fact is far from dispositive, see Luna, 788 N.E.2d at 834 ("Nor is the requirement of warnings to be imposed simply because the questioning takes place in the station house." (quoting Oregon v. Mathiason, 429 U.S. 492, 495 (1977))).

Lopez was not handcuffed in the vehicle or during the questioning. Cf. Jones v. State, 866 N.E.2d 339, 343 (Ind. Ct. App. 2007) (concluding that the defendant was in custody, as he was "being detained in a juvenile facility and was handcuffed"), trans. denied. He was allowed to leave the police station immediately following the interview. See Luna, 788 N.E.2d at 834; Kubsch v. State, 784 N.E.2d 905, 917 (Ind. 2003) (concluding the defendant was not in custody for purposes of Miranda where "he was unrestrained and [left the police station] after both the first and second interview").

Although Lopez was a possible suspect at this initial interview, our supreme court has consistently stated that questioning an individual the police suspect of a crime does not inherently render the questioning custodial interrogation requiring Miranda warnings. See Luna, 788 N.E.2d at 834 ("Nor is the requirement of warnings to be imposed simply because . . . the questioned person is one whom the police suspect." (quoting Mathiason,

429 U.S. at 495)); Cliver v. State, 666 N.E.2d 59, 66 (Ind. 1996); see also Beckworth v. United States, 425 U.S. 341, 346-47 (1976) ("It was the compulsive aspect of custodial interrogation, and not the strength of or content of the government's suspicions at the time the questioning was conducted, which led the Court to impose the Miranda requirements with regard to custodial questioning" (quoting United States v. Caiello, 420 F.2d 471, 473 (2d Cir. 1969))).

Considering all the circumstances, we conclude that Lopez was not in custody for purposes of Miranda at the April 14 meeting. Although the interview took place at the police station, Lopez was never handcuffed nor told that he was not free to leave. No evidence indicates the questioning was unduly coercive, and it appears that the interview was relatively brief. Lopez himself admits that the officers did not force him to accompany them to the police station, and Lopez freely left the interview after its completion. As Lopez was not in custody, Miranda warnings were not necessary, and the trial court did not abuse its discretion in admitting the evidence obtained at this interview.

2. The April 16 and 21 Interviews

Assuming that Lopez was in custody at the April 16 and 21 interviews, we must determine whether the police officers adequately advised Lopez of his Miranda rights and whether Lopez voluntarily waived those rights.

We will conclude a defendant waived his Miranda rights where "the defendant, after being advised of those rights and acknowledging an understanding of them, proceeds to make a statement without taking advantage of those rights." Cox v. State, 854 N.E.2d 1187, 1193 (Ind. Ct. App. 2006). The State bears the burden of

demonstrating beyond a reasonable doubt that a waiver of Miranda rights was voluntary. Blanchard v. State, 802 N.E.2d 14, 29 (Ind. Ct. App. 2004). Appellate courts will examine the totality of the circumstances to determine if the State has met its burden of "establishing that [a defendant's] waiver was based on his knowledge and understanding of his constitutional rights." State v. Keller, 845 N.E.2d 154, 164 (Ind. Ct. App. 2006). Factors that are commonly considered include "the crucial element of police coercion; the length of the interrogation; its location; its continuity; the defendant's maturity; education; physical condition; and mental health." Miller v. State, 770 N.E.2d 763, 767 (Ind. 2002). We will look for "substantial, probative evidence of voluntariness," and will not reweigh the evidence. Allen v. State, 787 N.E.2d 473, 481 (Ind. Ct. App. 2003) (quoting Kahlenbeck v. State, 719 N.E.2d 1213, 1216 (Ind. 1999)), trans. denied.

Lopez argues that the State failed to demonstrate that he understood the Miranda warnings given to him by Valdez and Sergeant Muldanado. Lopez makes no argument that the warnings given by Valdez and Sergeant Muldanado were not accurate and sufficient descriptions of Lopez's Miranda rights, but argues that the State has failed to prove that Lopez understood these warnings. We agree that in circumstances where the defendant's ability to understand warnings is at issue, the State must prove that the defendant understood the language in which the warnings were given. Cf. Morales v. State, 749 N.E.2d 1260, 1267 (Ind. Ct. App. 2001) (expressing concern "that the unavailability of qualified interpreters throughout the state might impinge on the constitutional rights of Hispanics"). This observation is merely a necessary extension of the State's burden to prove that a defendant knowingly and voluntarily waived his

Miranda rights. However, "[a]lthough language barriers may inhibit a suspect's ability to knowingly and intelligently waive his Miranda rights, when a defendant is advised of his rights in his native tongue and claims to understand such rights, a valid waiver may be effectuated." United States v. Hernandez, 913 F.2d 1506, 1510 (10th Cir. 1990), cert. denied, 499 U.S. 908 (1991). The translation "need not be a perfect one, so long as the defendant understands that he does not need to speak to police and that statements he makes may be used against him." Id. We will deem a warning adequate as long as the translation is "sufficient to convey the essence of the Miranda warning." United States v. Hernandez, 93 F.3d 1493, 1502 (10th Cir. 1996). As long as we conclude that a defendant understands that "he may choose not to talk to law enforcement officers, to talk only with counsel present, or to discontinue talking at any time," we will conclude a defendant received adequate warning. Colorado v. Spring, 479 U.S. 564, 574 (1987) (recognizing that "[t]he Constitution does not require that a criminal suspect know and understand every possible consequence of a waiver of the Fifth Amendment privilege").

In regard to the interview given on April 16, Valdez testified that she read Lopez his Miranda warnings off a card given to her by the State Police and that Lopez indicated that he understood his rights and wanted to answer the officers' questions. She also testified that during their conversation, Lopez never indicated to her that he did not understand what she was saying to him. Tr. at 701

In regard to the interview given on April 21, Sergeant Muldanado testified that he gave Lopez "the standard, legally-approved Miranda warnings," and that Lopez did not "give . . . any indication he wasn't understanding [Sergeant Muldanado], understanding

[the] questions, or anything with regards to the scope of the words [Sergeant Muldanado was] giving." Tr. at 729. Prior to giving these warnings, Sergeant Muldanado had general conversation with Lopez, and Lopez "indicated he understood [Sergeant Muldanado] very well." Tr. at 726. Although Lopez testified that he did not understand everything Sergeant Muldanado said to him, the following exchange took place between the prosecutor and Lopez at the hearing on Lopez's motion to suppress:

> Q: Let's go back to the beginning of that night [of April 21]. Did [Sergeant Muldanado] read you your rights?
> A: Yes.
> Q: Okay. So, you know what I'm talking about. [H]e advised you that you didn't have the obligation to talk to him?
> A: To talk to who?
> Q: To [Sergeant Muldanado]?
> A: I think so, yes.
> Q: Did he advise you that you had the right to have a lawyer present?
> A: Yes.
> Q: Did you indicate to [Sergeant Muldanado] that you understood those rights?
> A: Yes.
> Q: And did you indicate to [Sergeant Muldanado] that you wished to answer his questions?
> A: Yes.

Tr. at 489. From this exchange, it is clear that Lopez was informed of and understood his basic Miranda rights.

Lopez also points out that he is from Guatemala and complains that Sergeant Muldanado and Valdez, who are not, speak slightly different versions of Spanish than he does. The fact that Valdez and Sergeant Muldanado did not speak the same dialect of Spanish that Lopez did is not fatal, as Lopez was asked in Spanish if he understood his rights and responded that he did. See Perri v. Director, Dep't of Corrections, State of Ill., 817 F.2d 448, 453 (7th Cir. 1987) (concluding officers' Miranda warnings were

"adequately translated," even though they were given in a dialect of Italian different than the defendant's, where the defendant indicated he understood his rights), cert. denied, 484 U.S. 843 (1987); cf. United States v. Robles, 313 F.Supp.2d 1206, 1221 (D. Utah, 2004) (concluding the defendant made a knowing and intelligent waiver of his Miranda rights where the defendant told the interpreter that he understood the translation of his rights). Further, Valdez indicated that she had spoken with people from Guatemala on previous occasions, and had not had significant communication barriers. See Tr. at 698 (Valdez testifying that "I've communicated with other Guatemalans, and they've always understood my Spanish"). Lopez has not demonstrated that he was unable to communicate in Spanish with Valdez and Muldanado to the point that he did not understand his Miranda warnings. Cf. id. at 726 (Sergeant Muldanado comparing the difference between the dialect of Spanish spoken by him and Lopez to the differences in English spoken by people in different parts of the United States).

Based on the totality of the circumstances, we conclude that the trial court's finding that the State demonstrated beyond a reasonable doubt that Lopez knowingly and intelligently waived his Miranda rights is supported by sufficient evidence. Therefore, the trial court did not abuse its discretion in admitting the statements made by Lopez at the April 16 and 21 interviews.

C. Exclusion of the Victim's Character Evidence

Lopez next argues that the trial court abused its discretion in excluding evidence regarding Melvin's prior convictions of crimes of violence against Brandi and of his alleged gang tattoos.

We recognize that "a defendant is permitted to introduce 'evidence of a pertinent trait of character of the victim of the crime.'" Brooks v. State, 683 N.E.2d 574, 576 (Ind. 1997) (quoting Evid. R. 404(a)). Evidence of a victim's propensity for violence is relevant and admissible when the defendant claims self-defense. Wilcher v. State, 771 N.E.2d 113, 115 (Ind. Ct. App. 2002), trans. denied. However, Lopez did not raise the issue of self-defense at trial. Instead, Lopez's defense was that he was not present at the apartment and that someone else must have committed the murder.[2]

Lopez has not identified any relevant purpose for putting evidence of Melvin's character before the jury. Evidence of a victim's character "should not be considered in determining guilt, innocence or appropriate punishment." Williams v. State, 724 N.E.2d 1070, 1081 (Ind. 2000) (citation omitted), cert. denied, 531 U.S. 1128 (2001). Melvin's character is clearly not an essential element of Lopez's defense. See Guillen v. State, 829 N.E.2d 142, 147 (Ind. Ct. App. 2005) (concluding the trial court did not abuse its discretion in excluding evidence of the victim's prior reckless conduct, as the victim's "character was [not] an essential element of [the defendant's] defense that he did not hit her"), trans. denied.

As Lopez has failed to demonstrate how the excluded evidence is relevant to any material fact at issue in his trial, we conclude the trial court did not abuse its discretion in excluding the evidence. See Forgey v. State, 886 N.E.2d 16, 22 (Ind. Ct. App. 2008)

[2] We also note that the evidence indicates Melvin was stabbed initially while lying in bed, and was ultimately stabbed over seventy times. Under these circumstances, a self-defense claim would almost certainly have been rejected. See McKinney v. State, 873 N.E.2d 630, 643 (Ind. Ct. App. 2007) (recognizing that a valid claim of self-defense requires that "the force used must be proportionate to the requirements of the situation"), trans. denied; cf. Randolph v. State, 755 N.E.2d 572, 576 (Ind. 2001) ("[F]iring multiple shots [at a victim] undercuts a claim of self-defense.").

III. Violation of the Witness Separation Order

Under Indiana Evidence Rule 615, at the request of a party, the trial court "shall order witnesses excluded so that they cannot hear the testimony of or discuss testimony with other witnesses." The trial court may not, however, exclude a party, a designated representative of a party, or "a person whose presence is shown by a party to be essential to the presentation of the party's case." Id.

Prior to trial, the State filed a motion for separation of witnesses. The trial court granted this motion. The State called Brandi to testify as its first witness. After this testimony, the trial court advised Brandi that she was not to discuss her testimony or any questions asked of her with any other witnesses in the case. Lopez subsequently called Brandi as his eleventh and final witness. Lopez elicited testimony that Brandi had contacted someone who was present at the trial, and had asked this person various questions regarding the course of the trial. It also appears that Brandi may have attempted to talk to some of her relatives, who were also under subpoena, but they had refused to give her any information regarding the course of the trial. Lopez now argues that Brandi violated the separation order,[3] and that this violation required a mistrial.

Lopez recognizes that his trial counsel did not move for a mistrial after discovering that Brandi violated the separation of witnesses order. To avoid waiver, he argues first that the error amounts to fundamental error and that the trial court should have sua sponte ordered a mistrial. He also argues that his trial counsel's failure to move for a mistrial constituted ineffective assistance of counsel. To accept either of Lopez's

[3] Although we recognize the State's argument that Brandi's communications did not violate the separation order, we will assume, without conclusively deciding, that Brandi's communications constituted a violation.

arguments, we would have to conclude that a mistrial was a proper remedy for Brandi's act of contacting people present at the trial. See Bouye v. State, 699 N.E.2d 620, 624 (Ind. 1998) (rejecting the defendant's argument that his counsel was ineffective for failing to move for a mistrial after concluding that a mistrial would not have been granted); Carter v. State, 512 N.E.2d 158, 165 (Ind. 1987) (rejecting the defendant's argument that a witness's response was so prejudicial that the trial court should have ordered a mistrial sua sponte after concluding that "a mistrial, whether on his motion or that of the court, simply was not merited").

Lopez claims that "[i]t has been long established in Indiana Law that when a violation of Rule 615 occurs, the Court shall presume prejudice, which presumption must be overcome before the erroneous decision may stand." Appellant's Brief at 39. We recognize that three decisions by different panels of this court have made statements to this effect. See Myers v. State, 887 N.E.2d 170, 190 (Ind. Ct. App. 2008); Ray v. State, 838 N.E.2d 480, 488 (Ind. Ct. App. 2005), trans. denied; Stafford v. State, 736 N.E.2d 326, 331 (Ind. Ct. App. 2000), trans. denied. These decisions all ultimately rely on Justice Boehm's dissenting opinion in Hernandez v. State, 716 N.E.2d 948, 955 (Ind. 1999).

In Hernandez, the defendant requested and received an order for the separation of witnesses. However, the defendant sought to exclude a witness from this order, arguing that he was an "essential witness" under Indiana Evidence Rule 615. Id. at 950. The trial court agreed and allowed this witness to sit at counsel table during the trial. Our supreme court held that the trial court properly determined that the witness was essential to the

State's case and allowed him to remain at counsel table during the trial. Id. at 951. Justice Boehm, joined by Justice Dickson, dissented, concluding that the witness was not an essential witness. Id. at 954 (Boehm, J., dissenting). Justice Boehm went on to discuss the applicable standard of review when the trial court makes an erroneous decision under Rule 615. He noted that three standards exist in the federal courts, but that the majority rule is that the burden is on the party objecting to the trial court's decision to show prejudice. Id. at 955. Justice Boehm, however, agreed with the minority position and stated, "[b]ecause there is no meaningful way to measure the harmfulness of the educational value to a witness who sits through the other witnesses' testimony before taking the stand, I think that the correct approach is to presume prejudice when the trial court errs on a separation order. This can be overcome if the non-movant can show that no prejudice occurred." Id.[4]

We find the reliance on Justice Boehm's dissent misplaced. Justice Boehm was addressing the remedy for a trial court's improper determination that a witness was an essential witness under Evidence Rule 615, and was therefore excluded from a separation of witness order and permitted to sit at counsel table throughout a trial. Justice Boehm did not address the remedy for a witness's violation of a trial court's order in his dissent.[5]

[4] A majority of our supreme court's justices appear to agree with Justice Boehm. See Osborne v. State, 754 N.E.2d 916, 927 (Ind. 2001) (Boehm, J., concurring in result, with Shepard, C.J., and Dickson, J.) ("I would follow the federal circuits that require the party supporting the erroneous decision to show that the error was harmless.").

[5] This court's opinion in Stafford also dealt with a trial court's erroneous decision to allow officers to remain in the courtroom as "essential witnesses," 736 N.E.2d at 330, and its conclusion that a presumption of prejudice applied was completely consistent with Justice Boehm's dissent in Hernandez and his concurring opinion in Osborne, and we express no doubt as to the validity of this aspect of Stafford. Although we reject the statement in Myers that "prejudice is presumed when a violation of a separation-of-witnesses order occurs," 887 N.E.2d at 190, we note that this statement is dicta, as the court in Myers did not actually apply this presumption, and instead distinguished the violation in that case from the violation in Hernandez, and concluded the presumption was inapplicable, id. Therefore, the only Indiana case that has actually applied the presumption of prejudice to a

See also Osborne, 754 N.E.2d at 927. However, a wealth of Indiana case law addresses situations in which a witness violates a trial court's separation order.[6]

"The purpose of separation of witnesses order is to prevent witnesses from gaining knowledge from testimony of other witnesses and adjusting their testimony accordingly." Childs v. State, 761 N.E.2d 892, 895 (Ind. Ct. App. 2002). "The determination of the remedy for any violation of a separation order is wholly within the discretion of the trial court." Joyner v. State, 736 N.E.2d 232, 244 (Ind. 2000). We will not reverse a trial court's decision "absent a showing of a clear abuse of discretion." Id. "This is so even when the trial court is confronted with a clear violation of a separation order and chooses to allow the violating witness to testify at trial." Id.

It is well-established that every violation of a trial court's order for separation of witnesses does not require a mistrial. Hightower v. State, 260 Ind. 481, 486, 296 N.E.2d 654, 657 (1973), cert. denied, 415 U.S. 916 (1974). Substantial precedent indicates that the party challenging the trial court's decision to allow a witness to testify who has violated a court's order to testify bears the burden of demonstrating prejudice. See Halbig v. State, 525 N.E.2d 288, 292 (Ind. 1988) (affirming a trial court's decision to deny the defendant's motion for a mistrial and allow a witness to testify where the defendant "has not established prejudice from the violation of the separation order"); Wardlaw v. State, 483 N.E.2d 454, 456 (Ind. 1985) ("This Court will not disturb the trial

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witness's violation of a separation order is Ray. See 838 N.E.2d at 488. For the reasons stated herein, we conclude the court in Ray should not have applied this presumption, but note that Ray concluded that the State had overcome the presumption of prejudice, see id. at 488-89.

[6] Because Indiana Evidence Rule 615 does not address the remedy for a witness's violation of a separation order, cases decided on this point prior to the rule's adoption in 1994 are still good law. See Jiosa v. State, 755 N.E.2d 605, 607 (Ind. 2001); Heeter v. State, 661 N.E.2d 612, 615 n.2 (Ind. Ct. App. 1996).

court's exercise of discretion [after a witness has violated a separation order] unless there is a showing of prejudice tantamount to an abuse of discretion."); Hitt v. State, 478 N.E.2d 65, 69 (Ind. 1985) (finding no error in the trial court's denial of the defendant's motion for a mistrial on the grounds of a violation of a separation order and citing the rule that "[t]he burden is on the defendant to show that he was harmed and placed in grave peril by the ruling"); Resnover v. State, 460 N.E.2d 922, 934 (Ind. 1984) (finding no error where the party challenging the trial court's admission of the testimony "makes no showing to support his contention that he was prejudiced by the trial court's ruling"); Heeter, 661 N.E.2d at 614 ("Where there is a violation of a separation of witnesses order, we will not disturb the trial court's exercise of discretion unless there is a showing of prejudice tantamount to an abuse of discretion."); Shindler v. State, 166 Ind. App. 258, 268, 335 N.E.2d 638, 644 (1975) (declining to find reversible error in witnesses' violation of a separation order where the appellants "do not state how they were harmed by said violation," and "have not specified how they were prejudiced"); cf. Smith v. State, 169 Ind. App. 71, 77, 345 N.E.2d 851, 866 (1976) (holding that the trial court acted within its discretion in denying the defendant's motion for a mistrial, and that although the trial court abused its discretion in refusing to admit evidence demonstrating that a witness had violated the trial court's separation order, there was not sufficient prejudice to warrant a mistrial).

Justice Boehm clearly did not seek to part ways from this established line of cases in his dissent in Hernandez.[7] Indeed, in addressing whether a trial court's erroneous decision under Rule 615 "requires reversal and under what standard we make that decision," Justice Boehm specifically noted that "Indiana has no precedent on these points." Hernandez, 716 N.E.2d at 954-55 (Boehm, J., dissenting). Justice Boehm's dissent, therefore, did not seek to advocate a new standard for reviewing the trial court's decision to allow a witness to testify after that witness had violated a separation order, but sought to advocate a standard only for situations where a trial court had made an erroneous decision in excluding a witness from a separation order.[8]

We also note that our supreme court has recognized that "[i]t has long been held an abuse of discretion to refuse to permit the testimony of a witness due to a violation of a separation of witnesses order if the party seeking to call the witness is without fault in the violation." Jiosa, 755 N.E.2d at 607; see also Taylor v. State, 140 Ind. 66, 29 N.E. 415, 417 (1891) ("[W]here a party is without fault, and a witness disobeys an order directing a separation of the witnesses, the party shall not be denied the right of having

[7] We also point out that Justice Boehm authored Jiosa, where our supreme court ordered a new trial based on the trial court's decision to exclude testimony based on a witness's violation of a separation order. 755 N.E.2d at 609.

[8] We recognize that both situations result in a witness wrongfully gaining knowledge of other witnesses' testimony. However, where a trial court allows a witness to testify after that witness has violated an order, the trial court has the ability to assess the extent of the violation and the prejudice to a party. Thus, this court has a less compelling reason to presume prejudice on appeal, as the trial court has already determined that the violation is not overly prejudicial. Also, as discussed below, when a witness violates a separation order, this information should go to the jury, which in turn can consider this information in assessing the witness's credibility. On the other hand, a trial court's erroneous decision to exclude a witness from a separation order comes at the beginning of trial. The trial court will have no way of knowing the testimony to which this witness will be exposed at the time of its ruling. Therefore, when a party appeals a trial court's wrongful exclusion of a witness from a separation order, no determination of prejudice has yet been made when the case reaches this court. Further, witnesses who violate separation orders gain varying degrees of information regarding other witnesses' testimony. For instance, the witness in this case appears to have gained very little knowledge regarding other witnesses' testimony. However, a witness who is excluded from a separation order and remains in court throughout a trial has complete knowledge of all the evidence introduced at trial. This difference in degree of information gained by the witnesses provides another reason for applying different standards of review to the two situations.

the witness testify, but the conduct of the witness may go to the jury upon the question of his credibility."). As our supreme court noted, "if a party is denied the use of the witness's testimony, it is the party, rather than the witness, who is punished for the witness's violation." Jiosa, 755 N.E.2d at 607-08 (quoting 13 Robert Lowell Miller, Jr., Indiana Practice, § 615.104 at 287 (2d ed. 1995)). Thus, our supreme court recognized the "presumption that it is an abuse of discretion to exclude witnesses for violations of a separation order when the party seeking to call the witness had no part in the violation of the order." Id. at 608.

Based on these principles, we conclude that in situations such as the one at bar, where a witness violates a separation order and a party is not at fault, the party seeking a new trial bears the burden of demonstrating prejudice. It would be completely counter-intuitive to hold otherwise and leave the law in a state where a witness should be permitted to testify after that witness (without the involvement of a party) violates a separation order, but to then hold that we presume prejudicial error based on this violation.

Here, there is no allegation that the State somehow contributed to Brandi's violation of the trial court's order, and our review of the record finds no indication that the State was at fault in any way. Our review of the record also finds no compelling reason to depart from the presumption, and conclude the trial court properly allowed Brandi's testimony to stand and would have improperly ordered a mistrial, as such an order would have unjustly punished the State for Brandi's misconduct.

We also conclude that Lopez has wholly failed to demonstrate any prejudice stemming from Brandi's conduct. The State presented Brandi's testimony prior to her violation of the trial court's order. See Solomon v. State, 439 N.E.2d 570, 576-77 (Ind. 1982) (recognizing that the "purpose of the separation order was not violated" where a witness was allowed to stay in court following her testimony, and was not recalled by the State after she heard other witnesses testify); Carter v. State, 408 N.E.2d 790, 793-94 (Ind. Ct. App. 1980) (concluding that where witness 2 was not present during witness 1's testimony, witness 1 was allowed to remain in the court during witness 2's testimony, and witness 1 was not recalled, there was "at most a technical violation of the trial court's separation of witnesses order which was not prejudicial"). Further, Lopez called Brandi to testify and fully placed her violation of the separation order before the jury. See Hightower, 260 Ind. at 486, 296 N.E.2d at 658 (recognizing that an alleged improper conversation between a prosecutor and her witness "was fully explored on cross examination by defense counsel and the jury was again adequately apprised of this aspect of the revised testimony"); Ray, 838 N.E.2d at 488 (finding no prejudice where the jury was informed of an allegedly improper conversation violating a separation order); Smith, 169 Ind. App. at 75-77, 345 N.E.2d at 855 (recognizing that "a violation of [a separation] order goes to the credibility of the witness, and the jury should be allowed to hear such evidence," and recognizing that there was no error in allowing a witness's testimony where the witness "admitted his mistake before the jury"); cf. Hudgins v. State, 451 N.E.2d 1087, 1090 (Ind. 1983) (recognizing that the defendant could have inquired into any discussions between witnesses during the witnesses' testimony). Under these

circumstances, we conclude Lopez has failed to show any prejudice resulting from Brandi's violation of the separation order. We therefore conclude that the trial court did not err by not ordering a mistrial sua sponte and that Lopez's counsel was not ineffective for failing to move for a mistrial.

IV. Sentencing

A. Standard of Review

Lopez committed his crime before our legislature amended Indiana's sentencing statutes to replace the "presumptive" sentencing scheme with the "advisory" sentencing scheme. See Weaver v. State, 845 N.E.2d 1066, 1070 (Ind. Ct. App. 2006) (recognizing that this change took effect April 25, 2005), trans. denied. Therefore, the presumptive sentencing scheme applies to Lopez. See Gutermuth v. State, 868 N.E.2d 427, 431 n.4 (Ind. 2007).

Under the presumptive sentencing scheme, if the trial court imposes a sentence in excess of the statutory presumptive sentence, it must identify and explain all significant aggravating and mitigating circumstances and explain its balancing of the circumstances. Rose v. State, 810 N.E.2d 361, 365 (Ind. Ct. App. 2004). In reviewing the trial court's sentencing determination, we recognize that such determinations are within the sound discretion of the trial court, and we will only reverse for an abuse of discretion. Henderson v. State, 848 N.E.2d 341, 344 (Ind. Ct. App. 2006). Therefore, we will not modify the trial court's sentence unless it is clear that the trial court's decision was clearly "against the logic and effect of the facts and circumstances before the court." Rose, 810 N.E.2d at 365.

B. Mitigating Factors

Lopez's only argument with regard to his sentence is that the trial court improperly overlooked the mitigating factors of his work history and that "incarceration would cause a hardship on his dependents as Brandi testified he might be the father of her youngest child." Appellant's Br. at 42. Although the trial court has an obligation to consider all mitigating circumstances identified by a defendant, it is within the trial court's sound discretion whether to find mitigating circumstances. Newsome v. State, 797 N.E.2d 293, 301 (Ind. Ct. App. 2003), trans. denied. The trial court need not give a mitigating factor the same weight as would the defendant. Smallwood v. State, 773 N.E.2d 259, 263 (Ind. 2002). We will not remand for reconsideration of alleged mitigating factors that have debatable nature, weight, and significance. Newsome, 797 N.E.2d at 301. However, when the trial court fails to identify a significant mitigating factor clearly supported by the record, we are left with the reasonable belief that the trial court improperly overlooked and failed to consider that mitigating circumstance. Id.

Lopez argues that the trial court improperly failed to find his history of employment as a significant mitigating factor. Although under some circumstances, a defendant's work history can constitute a significant mitigating circumstance, such history "is not necessarily a significant mitigating factor." McKinney v. State, 873 N.E.2d 630, 646 (Ind. Ct. App. 2007), trans. denied. Lopez has not provided details regarding his work history. See Bennett v. State, 787 N.E.2d 938, 948 (Ind. Ct. App. 2003) (concluding the trial court properly declined to find the defendant's work history to be a significant mitigating circumstances where the defendant "did not present a specific

work history, performance reviews, or attendance records"), trans. denied. Further, Lopez has not explained why the fact that he has worked during his life should mitigate his sentence for murder. See Newsome, 797 N.E.2d at 301 ("Many people are gainfully employed such that this would not require the trial court to note it as a mitigating factor."). In sum, we conclude that the trial court acted within its discretion in declining to find Lopez's work history as a significant mitigating circumstance.

Lopez next argues that the trial court abused its discretion in declining to find hardship to his dependants as a mitigating circumstance. Initially, Lopez does not even state definitively that he has dependants, but states merely that "Brandi testified [Lopez] might be the father of her youngest child." Appellant's Br. at 42 (emphasis added). Even if Lopez does have a child, we point out that many defendants have families that are burdened by a defendant's incarceration, and "absent special circumstances, trial courts are not required to find that imprisonment will result in an undue hardship." Dowdell v. State, 720 N.E.2d 1146, 1154 (Ind. 1999). Also, Lopez has failed to demonstrate how the sentence imposed by the trial court imposes any more hardship on his family than would the minimum sentence of twenty years. See Gillem v. State, 829 N.E.2d 598, 605 (Ind. Ct. App. 2005), trans. denied. We conclude that the nature, weight, and significance of the hardship placed on any family that Lopez may have is debatable, and that the trial court did not abuse its discretion in affording no mitigating weight to this circumstance.

As the trial court did not abuse its discretion in failing to find the two mitigating circumstances discussed by Lopez in his appellate brief, we conclude the trial court did not abuse its discretion in sentencing Lopez.[9]

Conclusion

We conclude that the trial court did not abuse its discretion in admitting or excluding evidence. We also conclude that a mistrial was not warranted based on the violation of a separation of witnesses order, and therefore the trial court did not abuse its discretion in failing to order one and Lopez's counsel was not ineffective for failing to move for one. Finally, we conclude the trial court did not abuse its discretion in sentencing Lopez.

Affirmed.

BAKER, C.J., and RILEY, J., concur.

[9] To the extent that Lopez argues the trial court abused its discretion in weighing the four aggravating circumstances against the mitigating circumstance of Lopez's criminal history, we conclude the trial court did not abuse its discretion. Lopez's crime was particularly brutal, and was committed in the presence of a young child, see Ind. Code § 35-38-1-7.1(4) (stating that a trial court may consider as an aggravating circumstance that the defendant knowingly committed a crime of violence within the hearing of a person under the age of eighteen who was not the victim of the offense). Lopez left this child alone with Melvin's dead body, and the child remained in this state for approximately ten hours. Based on these circumstances, the trial court acted within its discretion in ordering a maximum sentence. See Gauvin v. State, 883 N.E.2d 99, 105 (Ind. 2008) (affirming a sentence of life without parole for the defendant's murder of her child and describing the offenses as "heinous and cruel"); Vasquez v. State, 762 N.E.2d 92, 97 (Ind. 2001) (concluding a defendant's enhanced sentence for murder was not improper, based in part on the trial court's finding that the "nature and circumstances of the crime were particularly brutal").